UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUIN CARCANO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, KATHRYN SCHAFER; ANGELA GILMORE; KELLY TRENT; BEVERLY NEWELL; and AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, Plaintiffs, vs. PATRICK MCCRORY, in his official capacity as Governor of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina, Defendants.	)	CASE NO. 1:16-CV-00236-TDS-JEP

DEFENDANT PATRICK L. MCCRORY'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY IN ORDER TO MORE FULLY RESPOND TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendant Patrick L. McCrory ("Governor McCrory") hereby files this memorandum of law in support of his motion for leave to conduct expedited discovery, pursuant to Federal Rules of Civil Procedure 6(b), 16, and 26 as well as Local Civil Rules 6.1(a), 16.1, and 26.1, in order to more fully respond to plaintiffs' pending motion for preliminary injunction filed May 16, 2016 (D.E. #21).

NATURE OF THE CASE

Plaintiffs filed this action on March 28, 2016. (D.E. #1: Pls.'s Compl. for Declaratory and Injunctive Relief.) Plaintiffs thereafter filed an amended complaint on April 21, 2016, prior to serving process on any of the defendants. (D.E. #9: Pls.'s First Amended Compl. for Declaratory and Injunctive Relief.) Seven weeks after initiating this action, plaintiffs filed a motion for preliminary injunction on May 16, 2016, along with a 45-page supporting brief. Under this Court's Local Rules, Governor McCrory's response to plaintiffs' motion for preliminary injunction is currently due by June 9, 2016.

STATEMENT OF RELEVANT FACTS

Plaintiffs seek to enjoin enforcement of North Carolina's Public Facilities Privacy and Security Act, N.C. Session Law 2016-3 ("the Act"), a law duly enacted by the North Carolina General Assembly. The Act created common sense bodily privacy protections for, among others, state employees, by requiring public agencies to require multiple occupancy bathroom and changing facilities to be designated for and used by persons based on their biological sex. S.L. 2016-3, H.B. 2, §§ 1.1-1.3 (N.C. 2016). Biological sex is the physical condition of being male or female, and the Act notes that such condition is "stated on a person's birth certificate." Id. §§ 1.2(a)(1) & 1.3(a)(1). The Act also allows accommodations based on special circumstances. Id. §§ 1.2(c) & 1.3(c).

On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"). N.C. Exec. Order No. 93 (Apr. 12, 2016). EO 93 expanded discrimination protections to state employees on the basis of sexual orientation and gender identity, among others. Id. § 2. EO 93 also affirmed North Carolina law that

cabinet agencies should require multiple occupancy bathroom and changing facilities to be designated for and only used by persons based on their biological sex. Id. § 3. EO 93 further reaffirmed North Carolina law that agencies may make a reasonable accommodation upon request due to special circumstances and directed all agencies to make a reasonable accommodation of a single occupancy restroom, locker room, or shower facility when readily available and when practicable. Id.

STATEMENT OF QUESTION PRESENTED

In light of the significant legal and factual issues raised by plaintiffs' motion to preliminarily enjoin enforcement of a duly enacted state statute intended to protect privacy and safety, should the parties be permitted to engage in expedited and targeted discovery so as to develop an appropriate factual record prior to a ruling on the motion by the Court?

ARGUMENT

I. A REASONABLE PERIOD OF TIME FOR EXPEDITED DISCOVERY PRIOR TO RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION IS PROPER IN LIGHT OF THE FACTUAL AND LEGAL ISSUES PRESENTED.

A. A Party Opposing Entry Of A Preliminary Injunction May Obtain Expedited Discovery Upon A Showing Of Reasonableness Or Good Cause Under The Totality Of The Circumstances.

Under the circumstances present in this case, expedited discovery is warranted on plaintiffs' motion for entry of a preliminary injunction. To obtain a preliminary injunction, plaintiffs must demonstrate each of the following factors as articulated: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable

harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. Winter v. Nat'l Resources Defense Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Moreover, because plaintiffs here are requesting a preliminary injunction that alters, rather than preserves, the status quo, they must satisfy an even more stringent burden. Specifically, "'[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.'" E. Tenn. Nat'l Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2003) (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980)).

In light of the fact that Governor McCrory is not the party moving for an injunction, the appropriate inquiry is whether, under the totality of the circumstances, the request for expedited discovery is reasonable or supported by a showing of good cause. See Dimension Data N. Am., Inc. v. Netstar-1, Inc., 226 F.R.D. 528, 531 (E.D.N.C. 2005) ("[A] standard based upon reasonableness or good cause, taking into account the totality of the circumstances, is more in keeping with [the] discretion bestowed upon the court in the Federal Rules of Civil Procedure."); see also Sabal Trail Transmission, LLC v. 9.669 Acres of Land, More Or Less, in Polk Cty. Fla., No. 8:16-CV-640-T-33AEP, 2016 WL 1729484, at *1 (M.D. Fla. Apr. 20, 2016) ("Federal courts will often allow parties to conduct expedited discovery if the moving party shows 'good cause.'"); Lab. Corp. of Am. Holdings v. Cardinal Health Sys., Inc., No. 5:10-cv-353-D, 2010 WL 3945111, at *3 (E.D.N.C. Oct. 6, 2010) (granting request for expedited discovery prior to preliminary injunction hearing); Ellsworth Assocs., Inc. v. United States, 917 F. Supp.

841, 844 (D.D.C. 1996) (holding that expedited discovery is particularly appropriate when a plaintiff seeks injunctive relief because of the expedited nature of injunctive proceedings and granting expedited discovery where movant narrowly tailored its requests). This authority derives from the broad powers granted to the district court for managing discovery under Rule 26 and other provisions of the Federal Rules of Civil Procedure.[1] See Dimension Data N. Am., 226 F.R.D. at 530-31. Factors a court may consider in evaluating the request for expedited discovery include: "(1) whether a motion for preliminary injunction is pending; (2) the breadth of the requested discovery; (3) the reason(s) for requesting expedited discovery; (4) the burden on the opponent to comply with the request for discovery; and (5) how far in advance of the typical discovery process the request is made." Sabal Trail Transmission, 2016 WL 1729484, at *1.

B. Under The Totality Of The Circumstances Present In This Case, Governor McCrory's Request For Expedited Discovery Is Reasonable And Supported By Good Cause.

This case presents the important issue of whether a law duly enacted by the North Carolina General Assembly should be declared unconstitutional and enjoined. Few issues can be of such weighty significance for a federal court. See Voting for Am., Inc. v. Andrade, 488 F. App'x 890, 895 (5th Cir. 2012) ("A federal court should not lightly enjoin the enforcement of a state statute. The determination of whether a democratically enacted statute is constitutional on its face requires that 'every reasonable construction

[1] Some courts in the Fourth Circuit have recently applied a modified version of the test for entry of a preliminary injunction, where *the party seeking the injunction is also the party seeking expedited discovery*, see, e.g., Forcex, Inc. v. Tech. Fusion, LLC, No. 4:11-cv-88, 2011 WL 2560110, at *5 (E.D. Va. June 27, 2011), but that is not the case here.

must be resorted to [ ] in order to save a statute from unconstitutionality.'") (citing Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988) and quoting Nat'l Fed. of Independent Business v. Sebelius, 132 S. Ct. 2566, 2594, 183 L.Ed.2d 450 (2012)) (internal citation omitted).

This is all the more true where, as here, plaintiffs' arguments are based not on application of clearly established precedent, but are in fact an attempt to expand the law in heretofore unexplored directions so as to invalidate a statute specifically passed by the General Assembly to protect privacy and public safety. In apparent recognition of this reality, plaintiffs supported their motion for preliminary injunction with hundreds of pages of documentation, including ten different declarations from purported expert witnesses and other individuals. Due to the nature of this evidence and the legal issues involved, plaintiffs even sought and received leave to exceed the normal page limit for their supporting memorandum by ***more than twice*** the number pages typically permitted by this Court's Local Rules. See Local Civil Rule 7.3(d) ("Briefs in support of motions and responsive briefs are limited in length to 20 pages[.]").

From plaintiffs' filings it is evident that the parties dispute not only the law, but also numerous issues of fact. To take one example, plaintiffs assert that barring biological men from women's restrooms and similar facilities does nothing to advance safety and have even offered a declaration contending that there are no safety hazards presented by allowing one sex to use the opposite sex's multiple-occupancy restroom or similar facilities. (D.E. #22: Mem. of Law in Supp. of Pls.' Mot. for Preliminary

Injunction 30-31.) Governor McCrory is prepared to offer proof that the policy embodied in the Act does in fact enhance safety.

Likewise, plaintiffs present a substantial amount of inaccurate and highly questionable evidence regarding gender theory. For instance, plaintiffs assert that gender identity is fixed and unchanging (see id. 22-24), but this fails to account for the numerous instances of gender fluidity (i.e., individuals who contend their gender changes from time to time) and the instances of individuals who have undergone gender reassignment only to later return to their original sex. Indeed, plaintiffs' memorandum in support of their motion for a preliminary injunction depends entirely on assertions of fact that radically reinterpret "sex" to mean a person's subjective "gender identity," including the following:

- "Everyone has a gender identity—a person's core sense of belonging to a particular gender. This identity is fixed at a young age and cannot be changed." (Id. 9.)
- "It disrupts treatment to force a transgender individual to use single-sex spaces that do not align with their gender identity." (Id. 10.)
- "[G]ender identity is the *only medically-appropriate determinate* of sex when assignment as male or female is necessary." (Id.) (emphasis added)
- "It would be extremely harmful to, for example, force a man who has gender dysphoria to be classified as female for social and legal purposes simply because he was assigned female at birth." (Id.)

- "*Medical science is clear* that it is inappropriate to use chromosomes, hormones, internal reproductive organs, external genitalia, or secondary sex characteristics to override gender identity for purposes of classifying some as male or female." (Id.) (emphasis added).

Just these few examples from plaintiffs' memorandum illustrate the extent to which their entire theory depends on assertions of fact that are, on their face, hardly statements of medical or psychological consensus. Before a state statute enacted to protect privacy and safety is swept aside on the basis of such dubious contentions, there should be an appropriate period to explore them further and offer rebuttal proof.

Furthermore, three of the plaintiffs (Carcano, McGarry, and H.S.) have alleged that using a restroom that matches their biological sex as identified on their birth certificates, as generally required by the Act, is not a viable option and would cause substantial harm to their mental health and well-being, plus put them in danger of harassment and violence. (Pls.' First Am. Compl. for Declaratory and Injunctive Relief ¶¶ 47, 82, & 111.) At a minimum, Governor McCrory should be allowed to explore what options are currently available to plaintiffs and what, if any, accommodations could be made to mitigate the alleged harm. In light of these myriad disputed issues of fact, discovery is necessary for Governor McCrory and the other defendants in this case to properly and completely respond to plaintiffs' motion for preliminary injunction.

Examination of the relevant factors supports a finding that expedited discovery is warranted here. Plaintiffs' have already filed their motion for preliminary injunction, which raises numerous issues of fact that must be explored in greater detail before a

complete response can be prepared. Moreover, the discovery limits and schedule requested are reasonable and targeted to the issues of factual dispute raised by plaintiffs' motion. It should be noted that plaintiffs themselves delayed over a month and half between the filing of their original complaint and the filing of their motion for preliminary injunction, during which time they were able to assemble declarations and the other evidence submitted to the Court in support of their request for injunctive relief.

Furthermore, Governor McCrory has now answered plaintiffs' amended complaint, and thus this is the time at which discovery would normally commence in this Court. See generally Fed. R. Civ. P. 16(b), 26(d) & (f); Local Civil Rules 16.1 & 26.1. This discovery should also not be unduly burdensome for plaintiffs, as it concerns matters on which discovery would have in any event been sought in the normal discovery process. As such, this request for four to six months of expedited discovery is reasonable and supported by a showing of good cause.

II. A PERIOD OF APPROXIMATELY FOUR TO SIX MONTHS WOULD ENABLE THE PARTIES TO ENGAGE IN THE RELEVANT DISCOVERY.

As part of this request for relief, Governor McCrory submits the discovery plan outlined in his motion, which would result in four to six months of discovery, depending on how quickly the parties can proceed. During this period, Governor McCrory would like the opportunity to depose each of the plaintiffs who are suing to enjoin Part I of the Act as well as the individuals proffered by plaintiffs as expert witnesses in connection with their motion for preliminary injunction. Furthermore, he may seek to depose any person or entity described in plaintiffs' amended complaint or identified in discovery to

the extent such testimony might be relevant to the immediate request for a preliminary injunction. During this period, Governor McCrory would similarly disclose his own expert witnesses and make them available for deposition.

The areas on which discovery is necessary are as follows:

a) How the State of North Carolina's interests in protecting privacy and safety are advanced by the Act;

b) The effects, including the effects on privacy and safety, of the policies advanced by plaintiffs that would permit persons of one sex to utilize multiple-occupancy restrooms, locker rooms, showers, and changing facilities designated for the other sex;

c) The State of North Carolina's interest in distinguishing between transgender individuals who have changed their birth certificates and those who have not;

d) The character and nature of gender identity and gender dysphoria, as well as the necessary treatment therefor, according to current medical and psychological science;

e) The nature and extent of the alleged harm to plaintiffs and those similarly situated; and

f) The nature and extent of the harm that would be suffered by plaintiffs if the Act is not enjoined versus the nature and extent of the harm that would be suffered by the public at large if the Act is enjoined.

It is anticipated that this discovery could reasonably be completed in this period, after which time the record will have been properly developed to a point where Governor McCrory can fully respond to plaintiffs' motion for preliminary injunction. At the conclusion of this discovery period, Governor McCrory would respectfully ask that the parties be permitted to file supplemental memoranda related to plaintiffs' request for a preliminary injunction.

CONCLUSION

WHEREFORE, Governor McCrory respectfully requests that the Court permit a period of expedited discovery, as described more fully in his contemporaneously filed motion, that he be permitted to file a more complete response in opposition to plaintiffs' motion for preliminary injunction at the conclusion of such discovery prior to the Court ruling on the motion, that there be a hearing for the presentation of testimony and oral argument pursuant to Local Civil Rule 65.1(b), and that he be granted such other and further relief as the Court may deem just and proper.

Respectfully submitted, this the 9th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 9th day of June, 2016.

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United States District Court,
M.D. Florida,
Tampa Division.

Sabal Trail Transmission, LLC, Plaintiff,
v.
9.669 Acres of Land, More Or Less, in Polk County Florida, et al., Defendants.

Case No: 8:16–cv–640–T–33AEP
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Signed 04/20/2016

ORDER

VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE

***1** THIS CAUSE comes before the Court upon Defendant Benner Land Corporation's Motion to Expedite Discovery. (Doc. # 26). Plaintiff Sabal Trail Transmission, LLC alleges that it holds a certificate of public convenience and necessity from the Federal Energy Regulatory Commission ("FERC") for constructing a natural gas pipeline, which purportedly extends across Defendant's property. (Doc. # 6 at 1–2). Pursuant to 15 U.S.C. § 717f(h), Sabal Trail has filed a complaint, a motion for partial summary judgment, and a motion for preliminary injunction to condemn the necessary easement and to obtain immediate access to the property. (Doc. # # 1, 4, 6). Citing the need to begin construction by June 21, 2016, in order to meet an in-service date of May 1, 2017, Sabal Trail has requested that the Court expedite the proceedings on its motions. *(See* Doc. # # 1 at 5; 6 at ¶ 5). Accordingly, the Court has scheduled a hearing on the motions for May 11, 2016. (Doc. # # 12, 14).

Defendant has moved to expedite discovery in order to obtain information they contend is necessary and relevant to defending against the motion for partial summary judgment and the motion for preliminary injunction. (Doc. # 26). Defendant does not seek full discovery at this time, but instead intends to submit a request for the production of twenty-nine categories of documents that relate to, among other things, the scope of the FERC certificate, whether the FERC-approved alignment sheets correspond to the easements Sabal Trail seeks to condemn, whether May 1, 2017, is the correct in-service date for the pipeline, and the damages Sabal Trail claims it will incur if it does not obtain possession of the easements by June 21, 2016. (Doc. # 26–1). Defendant also moves the Court to order that Sabal Trail make three individuals available for deposition on or before April 29, 2016: Brian Armitage, Marty Bass, and Ed Gonzales. (Doc. # 26). Each of those individuals provided declarations in support of the motion for preliminary injunction. (Doc. # # 5, 7, 8).

Ordinarily, a party may not conduct discovery before holding a conference pursuant to Federal Rule of Civil Procedure 26(f). Fed.R.Civ.P. 26(d)(1). However, a district court has "broad discretion" in controlling and scheduling discovery, *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1269 (11th Cir.2001), and Rule 26(d)(1) contemplates that a court may authorize discovery before the conference occurs. [1] Federal courts will often allow parties to conduct expedited discovery if the moving party shows "good cause." *Tracfone Wireless*, Inc. v. Adams, 304 F.R.D. 672, 673 (S.D.Fla.2015); *Hospitalists Mgmt. Grp. v. Fla. Med. Affiliates*, Inc., No. 2:14–cv–242–FtM–38DNF, 2014 WL 2565675, at *1 (M.D. Fla. June 6, 2014). In determining whether the moving party has shown "good cause," a court examines the following factors:

> (1) whether a motion for preliminary injunction is pending; (2) the breadth of the requested discovery; (3) the reason(s) for requesting expedited discovery; (4) the burden on the opponent to comply with the request for discovery; and (5) how far in advance of the typical discovery process the request is made.

***2** *St. Jude Med. S.C., Inc. v. Biosense Webster, Inc.*, No. 6:13–cv–333–Orl–28TBS, 2013 WL 1502184, at *1 (M.D.Fla. Apr. 12, 2013) (citing *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 6 (D.D.C.2006)). "Courts generally find good cause in cases in which ... the plaintiff seeks a preliminary injunction." *Burns v. City of Alexander City*, No. 2:14–cv–350–MEF, 2014 WL 2440981, at *1 (M.D.Ala. May 30, 2014) (citing *Qwest Commc'ns Int'l, Inc. v. WorldQuest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003)). A court should also be mindful of the general rule that the party opposing a motion for summary judgment should have time to complete discovery before the court considers the motion.

Jones v. City of Columbus, 120 F.3d 248, 253 (11th Cir.1997). Thus, the pendency of a motion for summary judgment is another factor weighing in favor of finding "good cause" for expedited discovery.

In consideration of the foregoing, the Court has determined that Defendant has shown good cause to expedite at least some discovery. Sabal Trail has moved for both partial summary judgment and a preliminary injunction and the Court has scheduled a hearing on those motions for May 11, 2016. The Court recognizes that three days after Defendant filed its Motion to Expedite Discovery, Defendant responded in opposition to the motions for partial summary judgment and preliminary injunction in order to meet the April 18, 2016, deadline. (Doc. # # 28, 29). However, as Defendant represented in its Motion to Expedite Discovery, Defendant is still entitled to discovery in order to prepare and present its defenses at the May 11, 2016, motion hearing. (Doc. # 26 at 3).

Further, it is due to Sabal Trail's request to expedite the proceedings that Defendant is operating under an accelerated time frame and has therefore requested expedited discovery. Defendant states it has reason to believe, among other things, that Sabal Trail's alleged in-service date may be inaccurate (which bears upon the motion for preliminary injunction), and that Sabal Trail's alignment sheets may not comport with the route approved by FERC (which bears upon both the motions for partial summary judgment and for a preliminary injunction). Under these circumstances, the Defendant has shown good cause to expedite discovery.

Although Defendant has shown good cause to expedite discovery, some of Defendant's requests to produce are overly broad, would be burdensome for Plaintiff to produce, do not relate to the categories of evidence identified in Defendant's motion to expedite, or are irrelevant to issues raised by Plaintiff's motions for partial summary judgment and preliminary injunction. Thus, the Court finds it appropriate to limit Defendant's requests to produce.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Defendant's Motion to Expedite Discovery (Doc. # 26) is GRANTED in part to the extent described below.

2. Sabal Trail shall make a good faith effort to produce documents identified in the Defendant's First Request to Produce as follows:

   a. Paragraphs 1, 3, 10, 11, 12, 13, and 16; and

   b. Paragraphs 8, 9, and 20 as they relate to Defendants' property.

3. Defendant's First Request to Produce (Doc. # 26–1) is deemed to be served on Sabal Trail as of the date of this Order.

4. Sabal Trail's response to Defendants' First Request to Produce as instructed in Paragraph 2 of this Order is due April 29, 2016.

5. No later than April 29, 2016, Sabal Trail shall make available for deposition the following three individuals: Brian Armitage, Marty Bass, and Ed Gonzales.

***3 DONE** and **ORDERED** in Chambers in Tampa, Florida, this *20th* day of April, 2016.

All Citations

Slip Copy, 2016 WL 1729484

Footnotes

1 Federal Rule of Civil Procedure 26(d)(1) provides: "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), *or when authorized by these rules, by stipulation, or by court order*." (Emphasis added).

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Only the Westlaw citation is currently available.
United States District Court, E.D. Virginia,
Newport News Division.

FORCEX, INC., Plaintiff,
v.
TECHNOLOGY FUSION, LLC,
and Kelly McDougallz, Defendants.

No. 4:11cv88.
|
June 27, 2011.

Attorneys and Law Firms

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Memorandum Opinion

TOMMY E. MILLER, United States Magistrate Judge.

***1** This matter is before the Court on Plaintiff's Motion for Expedited Discovery.[1] ECF No. 10. Plaintiff's Verified Complaint (ECF No. 1), filed May 25, 2011, alleges a number of claims against Kelly McDougall, individually, and as the sole member of the limited liability corporation Technology Fusion, stemming from the operation of Technology Fusion as a business that competes with Plaintiff in violation of McDougall's non-compete agreement. The complaint alleges diversity jurisdiction in this Court under 28 U.S.C. § 1332, and proper venue under 28 U.S.C. § 1391 as all the actions giving rise to the complaint occurred in the Eastern District of Virginia. For the reasons stated herein, the Court denied Plaintiff's Motion for Expedited Discovery. ECF No. 18.

I. *Procedural History*

Defendant Kelly McDougall ("McDougall") was formerly an employee of ForceX, Inc. in the position of Vice President, Airborne Division.[2] ForceX develops and manufacturers software applications for "airborne mission-execution platforms, battlefield and weapons management systems, and intelligence, surveillance, and reconnaissance operations." Compl. ¶ 10. While with ForceX, McDougall's responsibilities included business development, documentation training, and developing ForceX products. *Id.* ¶¶ 12–13. At the start of or during his employment, on February 26, 2009, McDougall signed an Employment, Confidential Information, and Invention Assignment Agreement ("Agreement"). The Agreement contained a non-compete agreement, as well as a confidentiality agreement. In relevant part, the Agreement states:

> [D]uring the course of my employment and for a period of thirty-six (36) months immediately following the termination of my relationship with the Company for any reason, whether with or without good cause or for any or no cause, at the option either of the Company or myself, with or without notice, I will not, without the prior written consent of the Company, (i) serve as a partner, employee, consultant, officer, director, manager, agent, associate, investor, or otherwise for, (ii) directly or indirectly, own, purchase, organize or take preparatory steps for the organization of, or (iii) build, design, finance, acquire, lease, operate, manage, invest in, work or consult for or otherwise affiliate myself with, any business in competition with or otherwise similar to the Company's business. The foregoing covenant shall cover my activities in every part of the Territory in which I may conduct business during the term of such covenant as set forth above. "Territory" shall mean (i) all counties in the State of New York, (ii) all other states of the United States of America and (iii) all other countries of the world; provided that, with respect to clauses (ii) and (iii), the Company derives at least five percent (5%) of its gross revenues from such geographic area prior to the date of termination of my relationship with the Company.
>
> ***2** Compl. ¶ 17.

Plaintiff claims that Virginia is one of the states referred to in section (ii) in which ForceX derives over 5% of its gross revenue. *Id.* ¶ 18. The Agreement further contained a clause prohibiting McDougall from soliciting or encouraging any employees to leave ForceX for a period of thirty-six months, and contained a clause prohibiting McDougall from interfering with ForceX's contracts or relationships, including

customer contacts for a period of thirty-six months. *Id.* ¶¶ 19–20.

Plaintiff claims McDougall is engaging in competitive behavior in violation of the Agreement. Plaintiff alleges that McDougall began competing through Technology Fusion as of the date of its registration with the State Corporation Commission on January 26, 2009, while McDougall was still employed at ForceX. *Id.* ¶ 29; State Corporation Comm'n Filing, ECF No. 1–2. McDougall argues, however, that simply forming the limited liability company does not prove competition. He did not begin working for Technology Fusion until much later, after he had left the employment of ForceX. McDougall Decl. ¶ 10. The registered address of Technology Fusion, LLC is the same address where McDougall operated as an employee for ForceX; 256 Mill Stream Way, Williamsburg, Virginia. McDougall also argues that neither Technology Fusion, nor he, individually, competed with ForceX. McDougall asserts that ForceX is engaged in a field of creating sensor interfaces to mapping applications that are intended to interface with airborne manned ISR missions and are specifically designed for mission-based assignments for military. Decl. ¶ 12. In contrast to this field, Technology Fusion does not compete in the ISR field, but focuses on mobile device system integration that does not address the needs of ISR missions. *Id.* ¶ 13.

Plaintiff claims they learned of Technology Fusion and McDougall's competition when ForceX was contacted by United States Investigative Services ("USIS") personnel seeking to interview ForceX as McDougall's former employer. Plaintiff asserts the request for an interview was initiated by McDougall's application to obtain additional security clearances to enable him to compete with ForceX. Compl. ¶ 32. In contrast, McDougall asserts that the USIS was seeking to interview ForceX as part of the routine five-year updating process to maintain security clearances he already possessed. The request for interview was not initiated by McDougall's application for additional security clearances. Decl. ¶ 15. Additionally, Plaintiff learned that McDougall demonstrated a prototype ISR mapping application to one of ForceX's commercial partners at the request of one of ForceX's current customers. *Id.* ¶ 33. Also, McDougall claims the events in complaint paragraph 33 never occurred, and cannot form the basis of the litigation. *Id.* ¶¶ 16–17.

ForceX filed their Verified Complaint in this Court on May 25, 2011, alleging (1) breach of duty of loyalty and fiduciary duty, (2) breach of contract, (3) violation of the Virginia uniform trade secrets act, and (4) intentional interference with contract. ECF No. 1. On May 26, 2011, Plaintiff filed a Motion for Temporary Restraining Order, Expedited Discovery and Preliminary Injunction. ECF Nos. 8, 9, 10. After discussion with the Court, Plaintiff agreed to carve out of the larger motion arguments pertaining to expedited discovery that were heard before the undersigned on June 7, 2011. Because of the nature of the motion, the undersigned entered a short order denying Plaintiff's Motion to Expedite Discovery immediately following the hearing. ECF No. 18. This memorandum opinion follows to detail the Court's reasons for denying Plaintiff's motion.

II. *Standard of Review*

***3** Plaintiff seeks expedited discovery to determine the extent of Defendants' competitive activities and to prepare for a hearing on the Motion for Temporary Restraining Order and Motion for Preliminary Injunction. They are requesting the Court to order each Defendant to serve responses to sixteen Requests for Production within a week, and request that McDougall submit to a deposition within two weeks. Mot. at 2. Plaintiff argues the expedited deposition and the requests for production are governed by two standards of review; the expedited deposition should be granted under the court's discretion in accordance with Federal Rule of Civil Procedure 30(a)(2)(A)(iii), and the requests for production should be governed under a similar standard that the Court would use in deciding whether to grant a preliminary injunction.

A. Rule 30

Rule 30 provides that a "party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2): (A) if the parties have not stipulated to the deposition and ... the party seeks to take the deposition before the time specified in Rule 26(d)...." Fed.R.Civ.P. 30(a)(2). Rule 26(b)(2) provides that the court may alter the frequency and extent of discovery as guided by the subsections in the Rule. Fed.R.Civ.P. 26(b)(2). Plaintiff argues that the language of the rule urges the Court to grant early depositions when they are requested and are consistent with Rule 26(b)(2). Plaintiff further argues that the advisory notes stress that the discovery timeline is simply to protect an unrepresented defendant; a problem not present in the current case. *See* Fed.R.Civ.P. 30 notes of advisory comm., 1970 amend.

The Court disagrees and finds that all requests for expedited discovery should be governed by the same standard, in accordance with other courts who have considered expedited discovery requests. The Court has "wide latitude in controlling discovery and ... its rulings will not be overturned absent a showing of clear abuse of discretion." *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir.2003). The discovery rules contained in the Federal Rules of Civil Procedure provide tools for a court to adjust the discovery time outlined by Rule 26, and "if warranted, to expedite the time for responding to the discovery sought." *Physicians Interactive v. Lathian Sys., Inc.*, 2003 WL 23018270, at *4 (E.D.Va. Dec.5, 2003). Courts have found that immediate discovery "should be granted when some unusual circumstances or conditions exist that would likely prejudice the party if he were required to wait the normal time." *Fimab–Finanziaria Maglificio Biellese Fratelli Fila, S.p.A. v. Helio Import/Export, Inc.*, 601 F.Supp. 1, 3 (S.D.Fla.1983) (citing *Gibson v. Bagas Restaurants*, 87 F.R.D. 60, 62 (W.D.Mo.1980)). Although the Defendants in the present case have been represented by attorneys even prior to the complaint being filed, circumstances do not exist which demonstrate to the Court that expedited discovery is warranted. Simply being represented by an attorney is not enough to warrant defeating the carefully drafted discovery timeline provided by the federal rules unless unusual circumstances exist.

B. Unusual Circumstances and Expedited Discovery

***4** Courts have granted expedited discovery when "unusual circumstances exist." *See, e.g., Fila*, 601 F.Supp. at 3. Determining when unusual circumstances exist that warrant granting expedited discovery is a somewhat murky question in the Fourth Circuit. Prior to 2008, many courts utilized a test for expedited discovery which relied heavily on the plaintiff sufficiently showing that it could meet the first and second prongs of the *Blackwelder* test required to obtain a preliminary injunction. *See, e.g., Physicians Interactive*, 2003 WL 23018270, at *4; *Religious Tech. Ctr. v. Lerma*, 897 F.Supp. 260, 267 (E.D.Va.1995). *Blackwelder* promulgated a standard used by the Fourth Circuit for thirty years to determine whether to issue a preliminary injunction. *Blackwelder Furniture Co. of Statesville v. Seilig Mfg.*, 550 F.2d 189 (4th Cir.1977). The *Blackwelder* test provided that a court should consider the following in determining if a preliminary injunction should issue:

(1) The likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;

(2) The likelihood of harm to the defendant if the preliminary injunction is granted;

(3) The likelihood that the plaintiff will succeed on the merits; and

(4) The public interest in granting or denying a preliminary injunction.

Courts using the *Blackwelder* test have considered the first two prongs together as a "balancing of the hardships" test, and have weighed this against the third prong of success on the merits. The result became a sliding scale for the plaintiff; as the plaintiff's showing of a likelihood of irreparable harm grew weaker, their showing of success on the merits would need to be stronger to gain a preliminary injunction. *See e.g., Religious Tech*, 897 F.Supp. at 263; *Klein v. Greenburg*, 461 F.Supp. 653, 654 (M.D.N.C.1978). *See also Religious Tech*, 897 F.Supp. at 267; Physicians *Interactive*, 2003 WL 23018270, at *4. *Blackwelder*, however, no longer governs the granting of emergency relief in the Fourth Circuit in the wake of the Supreme Court's decision in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374–75, 172 L.Ed.2d 249 (2008). *See The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47, *overruling Blackwelder*, 550 F.2d 189, *on reconsideration on other grounds*, 2010 U.S.App. LEX IS 11627 (4th Cir. June 8, 2010). The Fourth Circuit has rejected the sliding scale approach of *Blackwelder*, in favor of a stricter standard which requires the plaintiff seeking a preliminary injunction to demonstrate by a "clear showing" each of the following factors:

(1) Plaintiff is likely to succeed on the merits at trial;

(2) Plaintiff is likely to suffer irreparable harm in the absence of preliminary relief;

(3) The balance of the equities tips in plaintiff's favor; and

(4) An injunction is in the public interest.

The Real Truth About Obama, 575 F.3d at 346.

***5** Since replacing the *Blackwelder* test with the *Winter* test, the Fourth Circuit has yet to provide clear guidance on which portions of the *Winter* test a court should look to when considering a motion for expedited discovery.

C. Reasonableness Test and Preliminary Injunction Standard

In the absence of a specific standard delineated in the Federal Rules and in the Fourth Circuit, courts have considered two different standards in evaluating expedited discovery motions, one applying modified preliminary injunction factors and another "reasonableness," or "good cause" test. *See L'Occitane, Inc.*, 2009 U.S. Dist. LEXIS 101819, at * 5 (D.Md. Nov. 2, 2009) (citing *Dimension Data North America, Inc. v. Netstar–1, Inc.*, 226 F.R.D. 528 (E.D.N.C.2005)); *see also Notaro v. Koch*, 95 F.R .D. 402 (S.D.N.Y.1982) (using the preliminary injunction test); *Edgenet, Inc. v. Home Depot USA, Inc.*, 259 F.R.D. 385, 386 (E.D.Wis.2009) (using the "good cause" test). Our sister court in *Dimension Data* adopted the "reasonableness" test, finding that "a standard based upon reasonableness or good cause, taking into account the totality of the circumstances," was the more appropriate standard and less burdensome than a preliminary injunction standard. *Id.* (internal citations omitted). This Court disagrees that the reasonableness standard is in line with the reasoning of Supreme Court and the Fourth Circuit when it sought to curtail emergency relief, and provide such relief only in unusual or extraordinary circumstances. [3]

Motions for expedited discovery are routinely considered either during a court's consideration of motions for a preliminary injunction or temporary restraining order, or directly before such motions in order to prepare for a preliminary injunction argument. *See, e.g., CIENA Corp. v. Jarrard*, 203 F.3d 312 (4th Cir.2000); *Religious Tech*, 897 F.Supp. at 263; Fila, 601 F.Supp. at 3; *Klein*, 461 F.Supp. at 653. It is most logical to treat the motion for expedited discovery under a similar standard as to the preliminary injunction standard. Prior to overturning *Blackwelder*, the Fourth Circuit adopted the preliminary injunction test for expedited discovery. *Id.* Although a minority approach, the preliminary injunction test corresponds more closely with the idea that granting court relief outside of the federal rules should be limited to unusual circumstances, and only where the plaintiff has made a clear showing that such relief is necessary. *See St. Louis Group, Inc. v. Metals & Additives, Corp.*, 2011 U.S. Dist. LEXIS 5584, at *6, 2011 WL 1833460 (S.D.Tex. Apr. 26, 2011) (analyzing different approaches and finding the preliminary injunction test in the minority).

In the absence of an endorsement from the Fourth Circuit as to the proper test for expedited discovery in the wake of *Winter*, this Court finds that it is more reliable to continue to use a formulation of the preliminary injunction test. The balancing of the hardships has been discounted by the Supreme Court in favor of proof on each of the four elements, and emphasis placed on a strong showing of success on the merits of the action by the Plaintiff, and a showing that irreparable harm is "likely" and not simply "possible." *See Winter*, 128 S.Ct. at 374–75. Mirroring the Fourth Circuit and Supreme Court's emphasis on the elements of a strong showing of merits and irreparable harm to the Plaintiff, this Court will use these two elements to determine if expedited discovery is warranted in this instance.

III. *Analysis*

A. Merits

***6** To demonstrate success on the merits on the allegations presented in the complaint, Plaintiff must establish that the Agreement signed by McDougall during his employment with Plaintiff is valid and enforceable, and that Defendant did compete both before and after his employment with Plaintiff before Plaintiff may proceed with their counts. Construing the facts in favor of Plaintiff, they have presented sufficient facts that McDougall willingly signed an employment agreement during his tenure with Plaintiff. However, Plaintiff asserts that (1) New York law will govern this contract, and (2) under New York law, the covenant not to compete is reasonable and enforceable against McDougall. The Agreement contains a choice of law clause stating that New York law will govern. Plaintiff is correct that where the choice of law clause does not contravene public policy, it will usually be enforced. *See Senture, LLC v. Dietrich*, 575 F.Supp.2d 724, 727 (E.D.Va.2008). However, Defendant asserts a convincing argument that under these circumstances, enforcing the choice of law provision in this contract is unreasonable, and a court would not enforce this agreement should it be determined that the parties did not intend for the designated law to govern the contract. *See M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Under the circumstances and with the limited information now before the Court, it is unclear what the parties intended. Plaintiff never operated an office or headquarters in New York, or is it clear they did regular business in New York. Additionally, after McDougall signed his Agreement, the Agreement was rewritten before presenting the contract to other employees at ForceX. The Court does not have enough information at this time to determine which state law should govern, but it is the

Plaintiff's burden to make a strong showing that New York law governs, and they did not do so in this instance.

Additionally, it is unlikely in this Court's opinion, without further information, that the covenant not to compete would be found reasonable under either New York or Virginia law. Under New York law, courts "adhere to a strict approach to enforcement of restrictive covenants," and they will be only enforced "to the extent necessary to protect the employer from unfair competition." *Am. Inst. of Chem. Eng'rs v. Reber–Friel Co.*, 682 F.2d 383, 386–87 (2d Cir.1982). In determining whether to enforce a restrictive covenant, New York courts look at each covenant to determine if the employer has a "legitimate business interest necessary to sustain each" provision. *Kelly v. Envolution Mkts., Inc.*, 626 F.Supp.2d 364, 372 (S.D.N.Y.2009). The Agreement cited above restricts McDougall from all counties in the State of New York, all other states in the United States, and countries of the World where the Plaintiff derives at least 5% of their gross revenue. This Agreement is extremely broad. It is also unclear to the Court that the Agreement is narrowly tailored to McDougall in anyway. There is no mention of McDougall's specific job or role in the corporation beyond somewhat vague titles of "airborne programs"; the types of tasks he was engaged in, or the products to which he was given access. The Plaintiff asserts that as a Department of Defense contractor, the bulk of ForceX's business is done in Virginia, where the DOD is located. Even though this is the case, the Plaintiff presented minimal evidence that the Agreement makes any consideration of McDougall's role in the company, or attempts to restrict McDougall only in those areas where he may actually threaten a legitimate business interest of Plaintiff.

***7** Similarly, under Virginia law, the Plaintiff did not make a strong showing of success on the merits that the non-compete provision would be held enforceable against McDougall. When considering enforcement of a non-compete agreement, Virginia courts look at the restriction "in terms of function, geographic scope, and duration." *Simmons v. Miller*, 261 Va. 561, 581, 544 S.E.2d 666 (2001). The agreement will be enforced if it is narrowly drawn to protect the employer's legitimate interest (similar to New York's test), and is not unduly burdensome to the employee's livelihood. *Id.* As stated above, the provision of the agreement restricts an extremely broad geographic area, which without being further defined, could restrict the employee from ever operating a similar business or even in a similar company in the entire world. Additionally, there is no mention of McDougall's role in the corporation within the Agreement, and the Agreement does not seem narrowly drawn. Without more presented by the Plaintiff, it is difficult for this Court to imagine upholding such an agreement based on the extremely broad language of the geographic scope alone. For these reasons, Plaintiff has failed to make a strong showing that they would succeed on the merits.

Plaintiff has also failed to show success on the merits that McDougall violated his fiduciary duty to the corporation. Plaintiff points to the incorporation filing that McDougall made, forming Technology Fusion prior to leaving the employ of ForceX. However, they presented no evidence that Technology Fusion was operational or directly competed with ForceX at any point prior to McDougall leaving ForceX. Simply forming a corporation that has no defined purposes prior to leaving another's employment does not reach the threshold of a strong showing of competition in this Court's opinion.

B. Irreparable Harm to Plaintiff

In order to succeed in gathering expedited discovery, the Plaintiff must also demonstrate that they would likely suffer irreparable harm in its absence. Plaintiff has failed to make such a showing. The Verified Complaint asserts that McDougall, through Technology Fusion, demonstrated a "prototype ISR mapping application to one of ForceX's commercial partners at the request of one of ForceX's customers. The product that McDougall demonstrated is competitive with ForceX's products." Compl. ¶ 33. Plaintiff focused on this incident as strong evidence that Defendants are actively engaged in soliciting business away from ForceX with products that directly compete with ForceX. Expedited discovery is necessary, Plaintiff asserts, to find out more about Defendants products and their potential customers in order to prevent customer and revenue loss before it occurs through improper means. Defendant denied that this incident occurred.

Paragraph 33 constitutes the only factual assertion of irreparable harm made by Plaintiff. Although the potential loss of customers to ForceX would no doubt have an effect on their revenues and client good will, this is not an unusual type of harm. In all cases where a defendant is breaching their contract or non-compete agreement, the Plaintiff faces a risk of lost revenues or clients. The very point of non-compete agreements, and the litigation that follows in the wake of a breach of a non-compete agreement are remedies to this harm. The Plaintiff has made no showing that irreparable

harm will occur in this instance without expedited discovery, nor have they demonstrated any unusual circumstances which would cause the Court to order a divergence from the typical discovery timeline. The Federal Rules of Civil Procedure provide a practical and reliable timeline for Plaintiff to receive all of the information that they have requested in this motion. Because they have not made a strong showing of success on the merits, or of irreparable harm, this Court denied Plaintiff's motion for expedited discovery.

***8** The Clerk is DIRECTED to mail a copy of this Memorandum Opinion to counsel of record.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2560110

Footnotes

1 The full title of Plaintiff's motion is "Motion for Temporary Restraining Order, Expedited Discovery, and Preliminary Injunction." ECF No. 10. Prior to the hearing, the Motion for Expedited Discovery was carved out of the larger motion, and this section alone is before the undersigned.

2 The Verified Complaint states that McDougall was an employee of Plaintiff from February 26, 2009 through January 2, 2010. Compl. ¶ 8. McDougall asserts he was an employee of ForceX from July 2008 until December 2009. McDougall Decl. ¶ 2, Ex. A, ECF No. 16–1.

3 Even under a reasonableness standard, Plaintiff has still failed to demonstrate that its request for expedited discovery should be granted. Plaintiff argued that the sixteen requests for production are limited, and only seek to gain information as to the extent of harm. Upon looking at the requests, however, the Plaintiff is seeking broad categories of information, including Request 9: "Produce all cell phone, text message, and voicemail records from January 2, 2010 through the present, for any cell phone or portable communication device used by Technology Fusion, LLC from January 2, 2010, through the present." Additionally, Plaintiff is seeking expedited depositions, but has provided no Rule 30(b)(6) notice to determine the extent or topics of the deposition. These requests are not narrowly tailored to obtain relevant information necessary for expedited discovery purposes. *See Irish Lesbian & Gay Org. v. Giuliani,* 918 F.Supp. 728, 730–31 (S.D.N.Y.1996) (stating that courts "generally deny motions for expedited discovery when the movant's discovery requests are overly broad").

2010 WL 3945111
Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina, Western Division.

LABORATORY CORPORATION OF AMERICA HOLDINGS, Plaintiff,
v.
CARDINAL HEALTH SYSTEM, INC., et al., Defendants.

No. 5:10–CV–353–D.
|
Oct. 6, 2010.

Attorneys and Law Firms

Amie F. Carmack, K & L Gates LLP, Raleigh, NC, Robert I. Steiner, Kelley Drye & Warren LLP, New York, NY, for Plaintiff.

Paul J. Peralta, Nicole Marie Thompson, Moore & Van Allen PLLC, Charlotte, NC, for Defendants.

ORDER

WILLIAM A. WEBB, United States Magistrate Judge.

***1** This cause is before the Court upon the following motions filed by Plaintiff:

1) Motion for a preliminary injunction[1] and expedited discovery (DE–7);

2) Motion to file under seal (D E–10); and

3) Motion for a scheduling conference (D E–16)

These motions have been referred to the undersigned (DE–25) and are now ripe for adjudication. For the following reasons, Plaintiff's: 1) motion for expedited discovery (DE–7) is GRANTED; 2) motion to file under seal (DE–10) is GRANTED; and 3) motion for a scheduling conference (DE–16) is DENIED.

Background

Plaintiff provides medical laboratory tests and services. It operates a network of testing facilities and patient service centers across the United States. To expand that business, Plaintiff entered into negotiations for the purchase of PA Labs LLC ("PA Labs"), a clinical and anatomic laboratory. In September 2007, Plaintiff agreed to pay $74,000,000 in exchange for all the assets of PA Labs. Defendant Cardinal Health System, Inc. ("CHS") partially owned PA Labs at this time. As part of the Purchase Agreement, the sellers of PA Labs, on behalf of themselves and their affiliates, agreed to a Non–Competition Agreement which prohibited them from competing with Plaintiff for five years.

Effective January, 2009 Defendants Cardinal Health System, Inc. ("CHS") and Clarian Health Partners ("Clarian") entered into a merger agreement, whereby the two entities would provide medical services under the Clarian name. These services included operating a competing clinical and anatomic laboratory business in the territories that Plaintiff gained entry into by virtue of its $74,000,000 purchase of PA Labs. Plaintiff asserts that this conduct "eviscerates the protections bargained for in the Non–Competition Agreement" (DE–9, pg.2). Accordingly, Plaintiff now seeks the issuance of a preliminary injunction enjoining Defendants from engaging in competition with them (DE–7, pg.1).

Motion to Seal

Plaintiff requests that it be allowed to file the Declaration of Anil Asnani (DE–8) and its Memorandum of Law in Support of its Motion for Preliminary Injunction (DE–9) under seal.

When a district court considers entering a confidentiality order, it must first give the public notice and a reasonable opportunity to challenge the sealing order. *In re Knight Publ'g Co.*, 743 F.2d 231, 234–35 (4th Cir.1984) (holding that the district court erred in closing the courtroom and sealing courtroom documents in a criminal case without first giving the public notice and an opportunity to be heard); *see also In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir.1986); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 181 (4th Cir.1988). That is, the court must docket the motion to seal "reasonably in advance of their disposition so as to give the public and press an opportunity to intervene and present their objections to the court." *Knight Publ'g Co.*, 743 F.2d at 234. The court must also consider less drastic alternatives to sealing and, if it does enter a sealing order, it must provide "reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review." *Id.* In Stone, the Fourth Circuit extended application of the *Knight* requirements to civil cases.

***2** Here, the public has been given notice and a reasonable opportunity to challenge the sealing order. In addition, Plaintiff argues that it has sued Defendants for breach of their obligations under the Non–Competition Agreement entered into as part of a purchase agreement. By its terms, the purchase agreement does not permit the parties to disclose the information contained therein because of its confidential nature. The documents Plaintiff seeks to file under seal refer to the purchase agreement extensively. As noted by Plaintiff, "[t]here are logical and sound business reasons for ... confidentiality where financial and non-public terms of a business transaction are contained in the agreement between private parties" (DE–11, pg.3). Moreover, Plaintiff has also sufficiently demonstrated that redaction is not a practical alternative due to the extent these filings refer to the purchase agreement.

For these reasons, Plaintiff's motion to file under seal (DE–10) is GRANTED.

Motion for expedited discovery

Plaintiff also seeks expedited discovery with regard to its motion for a preliminary injunction (DE–7). Specifically, Plaintiff seeks expedited discovery on the following issues:

> (1) pursuant to Federal Rule of Civil Procedure 30(b)(6), the deposition of a corporate representative to elicit testimony on topics concerning the merger and/or integration between CHS and Clarian, and the corporate structure and ownership of Clarian and Clarian Pathology;
>
> (2) all documents concerning the merger and/or integration between CHS and Clarian, including but not limited to any letters of intent, merger agreements, articles of merger, term sheets, and other customary closing documents;
>
> (3) all documents related to Clarian's corporate structure, including but not limited to any organizational charts and documents sufficient to reflect any directors and officers of the corporation;
>
> (4) all documents related to Clarian's corporate ownership, including but not limited to documents sufficient to reflect any owners, parents, affiliates, partners, members, subsidiaries, investors, and stockholders;
>
> (5) all documents related to Clarian Pathology's corporate structure, including but not limited to any organizational charts and documents sufficient to reflect any directors and officers of the corporation;
>
> (6) all documents related to Clarian Pathology's corporate ownership, including but not limited to documents sufficient to reflect any owners, parents, affiliates, partners, members, subsidiaries, investors, and stockholders;
>
> (7) all documents related to CHS's pre-merger and/or pre-integration corporate structure, including but not limited to any organizational charts and documents sufficient to reflect any directors and officers of the corporation; and
>
> (8) all documents related to CHS's pre-merger and/or pre-integration corporate ownership, including but not limited to documents sufficient to reflect any owners, parents, affiliates, partners, members, subsidiaries, investors, and stockholders.
>
> ***3** (DE–9, pg.19–20).

Notably, Defendants do not oppose this request (DE–23).

"Federal Rules of Civil Procedure 26(d), 30(a), 33(b), 34(b) and 36 give this Court the power to adjust the timing requirements imposed under Rule 26(d) and if warranted, to expedite the time for responding to the discovery sought." *Dimension Data North America, Inc. v. NetStar–1, Inc.*, 226 F.R.D. 528, 530 (E.D.N.C. February 2, 2005) (internal quotations omitted). Generally, a request for expedited discovery is examined "on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Id.* at 531 (internal quotations omitted).

Here, Plaintiff has already filed its motion requesting a preliminary injunction, and has set out in detail the discovery it seeks. The requested discovery is not overbroad. Moreover, Plaintiff has alleged that it will be irreparably harmed by delaying discovery (DE–9, pg.14–15). Most importantly, Defendants do not oppose the request for expedited discovery, so the possibility of prejudice is slim.

For these reasons, Plaintiff's motion for expedited discovery (DE–7) is GRANTED. The scope of this expedited discovery shall be controlled by the issues identified by Plaintiff, *supra*.

Motion for a scheduling conference

Finally, Plaintiff requests a scheduling conference to, *inter alia*, "discuss the ... exchange of discovery on an expedited

basis" (DE–17, pg.1). This request does not comply with the Local Civil Rules of this Court. Local Civil Rule 7.1(c) states that "[n]o motion[ ] ... relating to discovery or inspection will be considered by the court unless ... there has been a good faith effort to resolve the discovery dispute[ ] prior to the filing of any discovery motions." Local Civil Rule 7.1(c). Given that Defendants do not oppose Plaintiff's request for expedited discovery, a scheduling conference with this Court is not necessary at this time. Accordingly, Plaintiff's request for a scheduling conference (DE–16) is DENIED.

Rather, the parties are ORDERED to confer regarding this expedited discovery no later than October 13, 2010. After this conference, the parties shall file a proposed expedited discovery plan. The proposed expedited discovery plan shall:

1) provide proposed deadlines for conducting expedited discovery;

2) provide a proposed briefing schedule regarding Plaintiff's motion for preliminary injunction;

3) provide at least three proposed dates on which to conduct a hearing on Plaintiff's motion for preliminary injunction.

The proposed expedited discovery plan shall be filed no later than October 20, 2010. To the extent practicable, the proposed expedited discovery plan should be a joint filing. After the filing of the proposed expedited discovery plan, the undersigned shall enter an appropriate order.

Conclusion

In accordance with the foregoing directives, Plaintiff's: 1) motion for expedited discovery (DE–7) is GRANTED; 2) motion to file under seal (DE–10) is GRANTED; and 3) motion for a scheduling conference (DE–16) is DENIED. The parties are ORDERED to confer no later than October 13, 2010 and submit a proposed expedited discovery plan no later than October 20, 2010.

***4** DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3945111

Footnotes

1 Plaintiff's motion for a preliminary injunction has been referred to the undersigned for the entry of a memorandum and recommendation, but is not yet ripe.